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SUMMARY RECORD OF THE 688th MEETING

Held at Headquarters, New York,
on Tuesday, 20 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, A/CN.9/470, A/CN.9/472 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider the issue of the form of assignment and noted that some delegations had expressed support for the Secretariat proposal concerning a "safe harbour" rule (A/CN.9/470, para. 82).

2. Mr. KUHN (Observer for Switzerland) said that the form of assignment must be addressed in the draft Convention. National legal systems varied in their requirements in that regard; conflict-of-law rules were sometimes lacking or difficult to apply; and the draft Convention must not be open to the interpretation that all assignments, regardless of form, were valid.

3. He therefore welcomed the proposed "safe harbour" rule, which would leave in place the substantive law and private international law rules of States parties; however, the wording suggested by the Secretariat could be improved.

4. Mr. BRINK (Observer for EUROPAFACTORING) reminded the Commission that the objective was to validate as many assignments as possible; any uncertainty could lead to an escalation of costs. As the Working Group had been unable to reach consensus on a substantive law rule, he was in favour of the solution proposed by the Secretariat.

5. Mr. DOYLE (Observer for Ireland) said that he supported the proposed "safe harbour" rule for the reasons set forth by the previous speakers.

6. Mr. SALINGER (Observer for Factors Chain International) said that any substantive law rule establishing a written form requirement would destroy the usefulness of the draft Convention to the United Kingdom, and doubtless to many other countries as well, since such assignments were subject to a high stamp duty that would make international factoring uneconomical.

7. Ms. WALSH (Observer for Canada) said that, while she supported the proposal for a "safe harbour" rule, she agreed with the observer for Switzerland that the wording of the draft did not cover all potential problems. In particular, the term "form requirements" might not be broad enough. It might be better to include a stronger reference to the law of the State in which the assignor was located, particularly in the case of assignments effective against third parties. Also, it was important to capture the distinction between the concept of assignment itself and the form requirements for contractive assignment; the latter constituted a vehicle for the transfer of proprietary interests, and some legislations stipulated that they should be submitted in written form or registered publicly.

8. Mr. COHEN (United States of America) said that he did not share the previous speakers' enthusiasm for the idea of including the form of assignment in the draft Convention. Bilateral contracts between assignor and assignee entailed a number of issues which were not dealt with in that instrument and which the Commission had not previously expressed the desire to address.

9. As the observer for Canada had noted, if the issue was raised it must be handled well, whether through a substantive law rule or a "safe harbour" rule; unless carefully drafted, even the latter might lead to the inference that the law of the State in which the assignor was located invariably prevailed. If the Commission was determined to include such a provision, he would prefer as flexible an approach as possible and was therefore prepared to agree to a "safe harbour" rule.

10. Mr. FERRARI (Italy) said that he disagreed with the United States representative; it went without saying that any rule established in the draft Convention must be a good one. In reply to the objection raised by the observer for Factors Chain International, he noted that, like the United Kingdom, Italy imposed a heavy stamp duty on written transactions. However, that did not prevent the Commission from establishing a substantive rule, since in such a case domestic regulations would not apply. Nevertheless, he was in favour of the "safe harbour" rule proposed by the Secretariat.

11. Mr. SCHNEIDER (Germany) said that, since the Commission was unlikely to reach consensus on a substantive law rule, his delegation was in favour of the Secretariat proposal. However, the italicized words "at least" (A/CN.9/470, para. 82) were unclear and should be deleted. Furthermore, there could be serious repercussions if the words "the State in which the assignor is located" were taken to mean the assignor's place of central administration, which might be in a different State. That problem must be resolved.

12. Mr. DOYLE (Observer for Ireland) agreed with the representative of Germany, that, since the Commission had failed to reach consensus on a substantive law rule, a "safe harbour" rule was the best option. He had no objection to the wording proposed by the Secretariat; a rule based on location might not be ideal, but no better solution had been found. He asked the Secretariat to explain the words "at least".

13. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the words "at least" had been included to ensure that an assignment was effective if it met the form requirements of the law of the State in which the assignor was located, even if it was not valid under the national legislation of another of the States concerned.

14. Mr. FERRARI (Italy) said that he had interpreted the proposal to mean that, even if the form requirements established under domestic law were met, an assignment would not be effective unless it met those of the State in which the assignor was located. Obviously, the statement must be reworded.

15. Mr. HERRMANN (Secretary of the Commission) referred the Commission to the analytical commentary provided by the Secretariat. The proposal was in line with the modern trend in private international law on validity, which was to give several options. Thus, the intent had not been to establish the law of the State in which the assignor was located as a minimum requirement, but rather to create as liberal a regime as possible by adding another option for meeting the standard of effectiveness.

16. Mr. COHEN (United States of America) said that he was prepared to accept the proposal as interpreted by the Secretary of the Commission, subject to its being redrafted for clarity. However, the Working Group had not discussed the term "form", which might not have the same meaning under all national legislations. He assumed that the term included the question whether a written signature was required and, if so, whether electronic signatures were acceptable; however, it also raised issues such as the need for notarial seals, witnesses, notification of third parties, paper size and colour and location of ribbons.

17. Ms. KESSEDJIAN (Observer for the Hague Conference on Private International Law) said that the concerns expressed by the Commission were directly linked to articles 9 and 12 of the 1980 Rome Convention. She did not think that requirements for the effectiveness of assignment as against third parties had ever been considered criteria for formal validity within the meaning of article 9 of that instrument. Her own view was that, for States which interpreted article 12 of the Rome Convention as covering the effectiveness of assignment, article 9 would be deemed to apply to the form of such assignment; however, for States which considered that article 12 did not deal with that issue, it followed that article 9 would not apply.

18. If the Secretariat proposal to establish a rule of private international law was adopted, it would be best not to be too specific, to clearly define the term "form" in the draft Convention and to include a limited number of options rather than leaving the draft instrument open to a broad range of interpretations.

19. Mr. STOUFFLET (France) supported the proposed "safe harbour" rule, which would add another option to those provided under international private law.

20. With regard to the issues raised by the observer for the Hague Conference, his delegation considered that the effectiveness of an assignment as against third parties should be dealt with solely as an issue of form since it was already covered in other articles of the draft Convention.

21. Mr. KUHN (Observer for Switzerland) suggested that the words "without prejudice to private international law rules outside of the Convention" should be added to the Secretariat proposal. The advantage of the "safe harbour" rule was that it made form requirements subject to the same law - that of the State in which the assignor was located - as articles 24 and 28 (2) of the draft Convention, thereby obviating the need for a clear distinction between form and substance.

22. Mr. IKEDA (Japan) stressed the importance of providing evidence for assignment, whether in written or electronic form. His own country operated a system for establishing priorities, but under the draft Convention, according to the annex to article 3, priority was to be determined on the basis of the date of the contract of assignment. If that provision was retained - and his delegation would prefer that it should not be - it was hard to see how the time of assignment could be proved. There was a danger of fraudulent collusion if a contract was purely oral.

23. Mr. MORÁN BOVIO (Spain) pointed out that many of the concerns raised went beyond the scope of the "safe harbour" rule, which dealt with the specific issue of what form requirements were effective as against third parties. For that purpose, the wording suggested in document A/CN.9/470, paragraph 82, was entirely adequate. He could accept the deletion of the phrase "as against third parties", although he would prefer to retain it; it had the merit of indicating that, once the necessary formalities had been met, they were applicable to all parties.

24. Mr. DOYLE (Observer for Ireland) was also able to accept any of the proposed oral amendments, but thought that there was no point in entering into a long academic debate on interpretation. The Commission should adopt the "safe harbour" rule, along the lines suggested by the Secretariat.

25. Mr. BRINK (Observer for EUROPAFACTORING) said that there seemed to be overwhelming support for a "safe harbour" rule which would operate without prejudice to any other private international law. It should be left to the drafting group to produce the best wording. The question of opposability, mentioned by the representative of France, need not be included. Further thought should, however, be given to the difficult matter of location, which impinged on many of the other issues to be settled.

26. Ms. WALSH (Observer for Canada) suggested an alternative wording for the "safe harbour" rule that would allow the application of other rules of private international law to establish validity but would confirm that, if the requirements were complied with, the assignment was valid. The text should read: "An assignment shall be considered formally valid if it meets the formal requirements of the law of the State in which the assignor is located." As the representative of Spain had said, there was no need to distinguish between validity between assignor and assignee and validity against third parties.

27. The CHAIRMAN pointed out that the assignor's location was only one criterion. Other laws might apply to the transaction and it was enough to meet the requirements under any one of them for an assignment to be valid.

28. Mr. HERRMANN (Secretary of the Commission) said that, if the phrase "shall be considered" in the Canadian amendment was intended to indicate a non-exclusive choice of laws, it was too subtle. The issue might be clarified by adding the phrase "or the requirements of the law which determines formal validity according to another applicable rule of private international law". He endorsed, however, the view that further changes should be left to the drafting group.

29. Ms. GAVRILESCU (Romania) concurred. There was clearly general support for the proposal, which should be given its final wording by the Drafting Group. She also noted that, once the Commission had decided that the law of the State in which the assignor was located was applicable, it followed that questions of substance as well as form would be determined under the same law.

30. Mr. MARADIAGA (Honduras) drew attention to paragraph 108 of document A/CN.9/470. When read in conjunction with paragraph 82, it strengthened the

case for a "safe harbour" rule and, indeed, gave more force to the draft Convention as a whole.

31. Mr. FERRARI (Italy) said that the Canadian amendment did not provide enough openings for other applicable legislation. A possible solution lay in the way that the Commission had dealt with a similar situation relating to debtors, in article 19, paragraph 6. On that basis, he suggested the following text: "Without prejudice to the formal validity of the assignment on the grounds of any other applicable law, an assignment is effective if it meets the form requirements of the law of the State in which the assignor is located." Paragraph 142 provided a useful commentary on article 19, paragraph 6, and by extension on his proposed amendment.

32. Ms. WALSH (Observer for Canada) suggested that the word "effective" should be replaced by the words "formally valid". The meaning of "effective" was extremely broad; the point should be made that the reference was solely to the validity of the assignment.

33. Mr. FERRARI (Italy) said that he had put forward his amendment with an eye to the Canadian amendment, but the suggested change constituted a further improvement.

34. Ms. GAVRILESCU (Romania) supported the Italian amendment, as subamended by the observer for Canada, since it sought to deal with the concerns that her delegation and others had expressed.

35. Ms. McMILLAN (United Kingdom) suggested a further subamendment: the words "if any" could be inserted after the word "requirements". She also suggested that the word "formal" in the first phrase should be deleted, as being otiose.

36. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the discussion highlighted the need to leave the wording to the drafting group. The expression "without prejudice" had a different meaning in different languages and should be used with caution. Sometimes it almost amounted to the same as "subject to". Indeed, no caveat at all was needed: private international law often offered options but, whichever law was applicable in a given situation, the validity of the assignment remained the same.

37. Mr. SALINGER (Observer for Factors Chain International) expressed bemusement at what seemed an academic debate. It would surely be peculiar if, in relation to the formality of an assignment, rules stricter than those obtaining in the country of the assignor were adopted. Yet under article 24 an assignment was given effect if it accorded with the law of the assignor. It therefore seemed that, as the United States delegation had suggested, no rule was needed at all.

38. The CHAIRMAN said that the "safe harbour" rule had met with firm support and the drafting group should take on its task on that understanding. He encouraged interested delegations, either within the ad hoc group or individually, to submit any further suggestions to the drafting group.

Articles 9 and 10

39. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that articles 9 and 10 should be considered in tandem. Article 9 validated assignments of receivables that otherwise were not specifically identified: bulk assignments, assignments of future receivables and partial assignments. Paragraph (1) (b) made no requirement for specific identification of receivables, but they had to be identified as receivables to which the assignment related. Paragraph (2) related to master agreements, with the intention of ensuring that there was no need for a new document with each assignment. He drew particular attention to two aspects of article 9. First, as stated in document A/CN.9/470, paragraph 84, there was no question of the draft Convention overriding statutory limitations in such areas as wages, pensions, real estate receivables, sovereign receivables and many others. The only exceptions were those limitations which sought to invalidate future receivables or bulk receivables as such. The Working Group had therefore suggested the introduction of a new provision on statutory limitations, as reproduced in paragraph 85. Secondly, paragraph 88 contained a suggested clarification of the distinction between effectiveness as between the parties against a debtor and effectiveness as against third parties. Lastly, in connection with article 9, he regretted that an inconsistency with the provisions of article 10 had crept into paragraph 2, in that it suggested that the time of transfer was not the time of assignment but that of the original contract. Such had not been the intention of the Working Group. Article 10 itself concerned the time when a receivable was considered to be transferred. It allowed assignors and assignees to delay a transfer by mutual agreement, including a transfer of future receivables, which in reality did not yet even exist. The commentary on the article, in paragraphs 96 and 97, largely concerned form rather than policy.

The meeting was suspended at 11.25 a.m. and resumed at noon.

40. Mr. ATWOOD (Australia) said that articles 9 and 10 both used the word "transfer" to refer to the concept of assignment; he asked whether that word was synonymous with the word "assignment".

41. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that article 9, paragraph 1, referred to the effectiveness of an assignment, while article 9, paragraph 2, and article 10, referred to a transfer within the meaning of the definition in article 2, namely the creation of rights in receivables as security for indebtedness or other obligation.

42. The CHAIRMAN said that, with regard to statutory limitations on assignments, the wording suggested by the Secretariat was to be found in paragraph 85 of the commentary, in document A/CN.9/470. It was a restatement of the concept that the draft Convention was not intended to override statutory limitations on assignability.

43. Mr. SMITH (United States of America) said that that was one of the points his delegation had made in document A/CN.9/472/Add.3. It would support additional language in article 9 to make it clear that statutory limitations on

assignment other than those referred to in article 9 were not affected by the draft Convention.

44. Mr. MEDIN (Observer for Sweden) said that, if the draft Convention was not intended to affect any statutory limitations on assignment other than those which followed from article 9, it would be a good idea to state that explicitly in the text. He therefore supported the language formulated by the Secretariat.

45. Mr. RENGER (Germany) said that his delegation fully supported the suggestion by the Secretariat. However, there could be difficulties with the interpretation of the word "statutory", which seemed to have a different meaning under some legislations.

46. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the intention was to refer to limitations imposed by law, not by contract. It was believed that the term "statutory" would be clear in most cases.

47. Ms. McMILLAN (United Kingdom) noted the suggestion in paragraph 85 of the commentary that there should be a new provision that would read: "This Convention does not affect any statutory limitations on assignment other than those referred to in article 9." Yet there was no reference to statutory limitations in article 9.

48. Mr. DOYLE (Observer for Ireland) said that he understood the intent but that article 9 did not seem to serve its purpose.

49. Mr. MORÁN BOVIO (Spain) said that his delegation fully supported the Secretariat suggestion. It was important to have a reference to article 9, even though that article did not expressly refer to statutory limitations. In many countries, there were statutory limitations on assignments of future receivables, bulk assignments, and assignments of parts of receivables; the text put forward by the Secretariat was very important because it implicitly stated that under article 9 it would be possible to override those statutory limitations.

50. Mr. SMITH (United States of America) said that his delegation agreed with that point. Similarly, a statute which provided for a contractual restriction on assignment in an original contract, would be inconsistent with articles 11 and 12 of the draft Convention. His delegation therefore believed that the preservation of statutory restrictions on assignments should be taken up by the drafting group so as not to interfere with the existing text of article 9, or the text of articles 11 and 12.

51. The CHAIRMAN said that the matter could be referred to the drafting group.

52. The next issue was effectiveness between the assignor, the assignee and the debtor, as opposed to effectiveness as against third parties.

53. Mr. IKEDA (Japan) sought clarification about the indication in paragraph 84 of the commentary that the draft Convention did not give priority to one creditor over another, but left matters of priority to national law, since in

article 10 the rules of priority were based on the time of the conclusion of the contract of assignment. That meant that a future receivable could take priority under the draft Convention or national law.

54. The CHAIRMAN recalled that the Secretariat had already indicated that, during the drafting process, an inconsistency had emerged between article 9 and article 10.

55. Mr. MORÁN BOVIO (Spain) said that his delegation fully supported the Secretariat's suggestions in paragraph 88 of the commentary, since they improved the text and made it clearer.

56. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Secretariat had felt that it was implicit in articles 11 and 12 that the exception with regard to statutory limitations applied not only to article 9 but also to articles 11 and 12. If it was the wish of the Commission, that point could be made clearer in article 9.

57. With regard to the comments made by the representative of Japan, he recalled that the previous draft of articles 9 and 10 had included wording which made the effectiveness of an assignment subject to the priority rules of the draft Convention. The Working Group had decided to delete that wording, so that, while effectiveness was governed by articles 9 and 10, priority was left to the law of the assignor's location.

58. The purpose of the suggestion in paragraph 88 of the commentary was to make the distinction between effectiveness and priority clearer, and to specify that the effectiveness of an assignment vis-à-vis third parties was left to the law of the assignor's location. It must be ensured that that rule did not extend to the effectiveness of the assignment of future receivables or bulk assignments, which were covered by articles 9 to 12; that was the reason for the second part of the suggestion. The objective, therefore, was to clarify the interplay between effectiveness and priority by ensuring that effectiveness between the assignor and the assignee and as against the debtor was subject to the draft Convention but, with regard to effectiveness as against third parties, priority was left to outside law. A difficulty arose, however, because in some jurisdictions it was not possible to split effectiveness into two parts; the draft Convention therefore needed to be as clear as possible.

59. Mr. WHITELY (United Kingdom) said that the two issues were distinct under the draft Convention and needed to be treated differently; it was to be hoped that the drafting group would find an appropriate formulation. He wondered whether a jurisdiction that did not recognize effectiveness would be likely to have rules of priority.

60. The CHAIRMAN said that the Commission would need to hear from such jurisdictions if it was to take their concerns into account when formulating the provisions of the draft Convention.

61. Mr. SMITH (United States of America) said that some national jurisdictions, when prohibiting assignments of future receivables or bulk assignments, might not distinguish in their domestic law between effectiveness and priority. If,

in such a case, the assignment was effective but priority was left to article 24 of the draft Convention, he wondered how priority would be determined under domestic law. The Working Group had wished to validate bulk assignments and assignments of future receivables, even if that would require a different interpretation or a change in a national law's priority rules that did not recognize those types of assignment. The Secretariat proposal in paragraph 88 was designed to address that issue, and to ensure that a priority rule did not destroy the intent to validate such assignments. His delegation fully endorsed that principle, but found the proposed language imprecise. The United States proposal (A/CN.9/472/Add.3) might address the two issues just discussed, as well as the issue of statutory prohibitions on assignment.

62. Mr. DOYLE (Observer for Ireland) supported the Secretariat proposal in paragraph 88, as it did clear up a possible ambiguity. With regard to the jurisdictional question, he entirely agreed with the previous speaker that the intent of that proposal was clear, and the drafting group could therefore take care of the exact wording. However, his delegation was also willing to look at the alternative language proposed by the United States delegation.

63. The CHAIRMAN noted that paragraph 95 of document A/CN.9/470 suggested that the inconsistency between article 9 (2) and article 10 could be resolved by deleting from article 9 (2) the reference to the time of the conclusion of the original contract of assignment. It also suggested the alternative of redrafting paragraph 9 (2) to make the language consistent with that of article 10.

64. Ms. McMILLAN (United Kingdom) said that her delegation supported the proposal to make the language of article 9 (2) consistent with that of article 10.

65. Mr. DOYLE (Observer for Ireland) said that his delegation preferred the simpler solution of deleting from article 9 (2) the reference to the time of conclusion of the original contract, but could also accept the alternative proposal of making the wording consistent with article 10.

66. Mr. MORÁN BOVIO (Spain) preferred to retain the specific reference to the time of conclusion of the contract of assignment, which would make article 9 (2) easier to understand.

67. Mr. RENGER (Germany) requested the Secretariat to read out the proposed new wording of article 9 (2).

68. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the text, prior to the last change proposed by the Working Group, read as follows: "Unless otherwise agreed, an assignment of one or more future receivables is effective when it arises without a new act of transfer being required to assign each receivable." However, the reference to the time a receivable arose was not intended to address the time of transfer, which was dealt with more clearly and fully in article 10. Article 9 (2) referred to the stipulation that the receivable had to arise in order for an assignment to be effective at the time, with the time being specified in article 10. It was intended to ensure that master agreements covered future receivables without

requiring additional documents. The Secretariat therefore preferred to delete the reference to time in article 9 in order to avoid dealing with the same issue in two different articles.

69. With the proposed deletion, article 9 (2) would read: "Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable."

70. Ms. McMILLAN (United Kingdom) and Ms. WALSH (Observer for Canada) supported the version just proposed by the Secretariat.

71. The CHAIRMAN assumed that the Commission accepted the new wording, subject to consideration by the drafting group.

72. Mr. SMITH (United States of America) said that to a large extent his delegation's proposal with regard to effectiveness as against third parties had already been accepted as a matter of policy by the Commission. Article 9 should not render ineffective any statutory prohibitions on assignments. That was reflected in his delegation's proposed article 9 (5) (A/CN.9/472/Add.3). However, a statute that merely validated contractual restrictions on assignment should not interfere with articles 11 and 12.

73. The Secretariat had proposed language very similar to his delegation's proposed article 9 (3) to make it clear that article 9 dealt with the effectiveness of the transfer between the assignor and the assignee, but did not affect third parties. Reference had been made to the problem of a statute that did not distinguish between effectiveness and priority when it rendered ineffective bulk assignments and assignments of future receivables. The proposed article 9 (4) also addressed that issue.

74. An additional issue was that national law should not prevent an assignment of future receivables or bulk assignments merely because such assignments could not take place under that law. On the other hand, many insolvency regimes under national law provided for different treatment of post-insolvency receivables. As discussed in the Working Group, in the case of a present assignment of future receivables, if the assignor was subject to insolvency proceedings, the insolvency administrator might have rights under national law to claim an interest in the receivables generated by the assignor after the commencement of those proceedings, even though those receivables had been assigned prior to the insolvency. In order to avoid interfering with national law on the treatment of post-insolvency receivables, his delegation had proposed an additional article 9 (6). According to that paragraph, a general law prohibiting future assignments or bulk assignments would not be recognized under the draft Convention, but an insolvency law with respect to post-insolvency receivables that dealt with priority would still be effective.

75. The CHAIRMAN asked the United States delegation to explain the differences between his proposal and the issues raised in that connection by the Secretariat.

76. Ms. WALSH (Observer for Canada) requested clarification from the United States delegation as to the purpose of the proposed paragraph 9 (3).

77. Mr. SMITH (United States of America) said that the proposed paragraph 9 (3) was very similar to the Secretariat's proposal. As a general rule, when article 9 referred to transfer, it was referring to the transfer as between the assignor and the assignee and not necessarily in relation to priority, which was left to article 24. The reason for paragraph (3) was the one indicated by the Secretariat. The key difference between the proposals related to the extent to which a national law that prohibited the assignment of bulk receivables and future receivables was rendered ineffective by the draft Convention. Such a national law would be rendered ineffective to the extent that it was a general law. However, a law that arose out of the insolvency rules of national law would not be rendered ineffective. The difference was primarily in the preservation of the insolvency rules as to future receivables.

78. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said it was not clear whether the differences were a matter of policy or a drafting issue. Effectiveness was covered only as between the assignor and the assignee and he wondered about effectiveness as against the debtor. Once effectiveness had been limited in that way, he did not see how a rule specifying that the assignment was effective as between the assignor and the assignee, even in the case of post-insolvency receivables, would affect the rights of the insolvency administrator or creditors in insolvency. That matter needed to be further clarified. Perhaps it could be addressed by limiting the effectiveness in article 9 to assignment as between the assignor and the assignee and as against the debtor, as proposed in paragraph 88 of document A/CN.9/470.

The meeting rose at 1.05 p.m.